

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the Truth
in Caller ID Act of 2009

WC Docket No. 11-39

COMMENTS OF NOBELBIZ, INC.

NobelBiz, Inc. (“NobelBiz”), by its attorneys, hereby submits these comments on the issues raised by the Federal Communications Commission (“FCC” or “Commission”) in the *Notice of Proposed Rulemaking* (“Notice”) released in the above-captioned proceeding on March 9, 2011. NobelBiz was a strong proponent of the Truth in Caller ID Act of 2009 (“the Act”), and NobelBiz supports the rules proposed by the Commission to implement the provisions in the Act.

NobelBiz is an innovator in the development and commercial use of calling party identification technology. Through its patented LocalTouch product, NobelBiz enables a wide range of businesses to establish a local market presence through the use of local area codes, akin to a business establishing a local presence through an advertisement in the local Yellow Pages directory. Conceptually, LocalTouch is a direct descendant of the Foreign Exchange (FX) services that were first introduced in the 1960’s by U.S. telecommunications carriers. Like FX service, LocalTouch permits a calling party to make a long distance voice call that is received by the called party as a local call. For businesses that seek to contact individuals by telephone, LocalTouch results in a higher call completion rate.

LocalTouch also supports government programs that benefit consumers. For example, the Home Affordable Modification Program¹ requires mortgage lenders to speak with qualified mortgage holders, either by telephone or in-person, and explain their rights under the program. It is much less expensive to speak with a mortgage holder by telephone than to dispatch a representative to speak with the mortgage holder in person. Because LocalTouch generates a higher call completion rate, it results in fewer in-person visits and delivers significant savings for U.S. taxpayers.

I. THE ACT IS NARROWLY TAILORED TO PROHIBIT KNOWINGLY HARMFUL USES OF CALLER ID TECHNOLOGY WITHOUT IMPAIRING LEGITIMATE USES

The touchstone of the Act is Congress' recognition that calling party identification technology is neither inherently harmful nor beneficial. Rather, Congress focused on how the technology is actually used. The principal problem Congress sought to address was the emergence of so-called "spoofing" schemes whereby bad actors manipulate caller ID information to defraud or otherwise harm consumers. At the same time, Congress was keenly aware that there are many legitimate and beneficial uses of calling party identification technology, and Congress carefully tailored the statutory language to prohibit only the knowingly harmful uses. In particular, Congress amended Section 227(e) to make it unlawful for "any person . . . to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value."

¹ See, e.g., "Home Affordable Modification Program (HAMP)," U.S. Department of the Treasury, U.S. Department of Housing and Urban Development, *available at* <http://www.makinghomeaffordable.gov/programs/lower-payments/Pages/hamp.aspx> (last visited Apr. 1, 2011); Home Affordable Modification Program Guidelines, U.S. Department of the Treasury (Mar. 4, 2009), *available at* http://www.treasury.gov/press-center/press-releases/Documents/modification_program_guidelines.pdf (last visited Apr. 1, 2011).

The legislative history of the Act is replete with evidence that Congress designed the statute to preserve legitimate uses of calling party identification technology. For example, Representative Rick Boucher stated that “[b]y prohibiting the use of caller ID spoofing only where the intent is to defraud or deceive, this measure will address nefarious uses of the technology while continuing to allow those legitimate uses.”² Mr. Boucher further noted that in certain legitimate uses, “there is not intent to cause harm, which is an element of the crime of deception.”³ Similarly, Representative Eliot Engel emphasized that the “bill outlaws the deceptive use of caller ID spoofing technology if the intention of the caller is to deceive and harm the recipient of the call,” and then noted that the intent to harm standard was important because “we don’t want some legitimate reasons to use this technology to be outlawed.”⁴ Supporting this view, the House Committee Report noted that “to be legally actionable, fraud and deceit require the intent to cause harm to the person to whom misleading information is being conveyed.”⁵

Further, there is evidence that Congress considered the type of calling party identification technology used in the LocalTouch product to be legitimate and beneficial.

Representative Cliff Stearns stated:

For example, domestic violence shelters often alter their caller ID information to simply protect the safety of victims of violence. Furthermore, a wide array of legitimate uses of caller ID management technologies exists today, and this bill protects those legitimate business practices. *For example, caller ID management services provide a local presence for teleservices and collection companies.* These calling services companies are regulated by the Federal Trade Commission and Federal Communications Commission, which require commercial callers to project a caller ID that can be called back. This bill is not intended to

² 111 Cong. Rec. H2523 (Apr. 14, 2010).

³ *Id.*

⁴ *Id.* at H2524; 111 Cong. Rec. H8378 (Dec. 15, 2010).

⁵ H.R. Rep. No. 111-461, at 7 (Aug. 13, 2010).

target lawful practices protecting people from harm or serving a legitimate business interest.⁶

Hence, both the statutory language and the legislative history confirm that Congress tailored the Act's provisions to prohibit the knowingly harmful uses of caller ID technology while expressly preserving the legitimate business uses of this technology.

NobelBiz is pleased to support the Commission's proposed implementing rules, which carefully track this critical distinction between harmful and legitimate uses of calling party identification technology.

II. THE COMMISSION SHOULD ESTABLISH AN EXEMPTION FOR CALLER ID TECHNOLOGIES THAT OFFER LOCAL AREA CODES FOR TERMINATING LONG DISTANCE CALLS SIMILAR TO FX SERVICES

The Act establishes two exemptions from its central provision – one for law enforcement agencies, and another for court orders – and it authorizes the Commission to establish additional exemptions “as the Commission determines is appropriate.” NobelBiz urges the Commission to consider establishing additional exemptions to provide the industry with certainty that specific technologies or activities embody legitimate rather than harmful uses of caller ID technology. Rather than relegating these issues to the vagaries of case-by-case litigation, the Commission should proactively implement a belt-and-suspenders approach, which would promote innovation, reduce compliance costs, and prevent needless and expensive litigation.

NobelBiz recommends that the Commission establish an exemption for calling party identification technology that offers the use of local area codes for terminating long distance calls in certain circumstances. This exemption is based on, and justified by, the

⁶ 111 Cong. Rec. H8378 (Dec. 15, 2010) (emphasis supplied).

Commission's experience over four decades with foreign exchange (FX) services. FX services have been defined as follows:

“Provides local telephone service from a central office which is outside (foreign to) the subscriber's exchange area. In its simplest form, a user picks up the phone in one city and receives a dial tone in the foreign city. He will also receive calls dialed to the phone in the foreign city. This means that people located in the foreign city can place a local call to get the user.”⁷

Numerous FCC decisions beginning in 1970 are consistent with this definition.⁸ The hallmark of an FX or FX-like service is that it enables one party to place long distance calls to a specific exchange area that are received by the call recipients in such exchange area as local calls.⁹ As the FCC has noted, “[FX service] allows a businessman located in one state, to, in effect, maintain a local phone in another state.”¹⁰ Put in other words, the call recipient perceives the incoming call to be a local call when in reality the call was originated by the calling party from outside the local calling area. In addition, with FX-like services the call recipient has the ability to place a return call to the original calling party by dialing the same local number.¹¹

⁷ See Newton's Telecom Dictionary, 22d Edition, at 400.

⁸ See *In the Matter of Chickasaw Telephone Company*, 26 FCC 2d 438, 440 (1970) (description of foreign exchange service).

⁹ See *In the Matter of Establishment of Interstate Toll Settlements and Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Public Service Commission*, 93 FCC 2d 1287, 1293-94 n.8 (1983) (“Foreign exchange (FX) service is a local exchange service provided to a customer through a central office of an exchange other than the exchange in which the customer is located.”).

¹⁰ See *In the Matter of Interconnection Facilities for the Western Union Telegraph Co.*, 53 FCC 2d 1045, 1045 n.2 (1975); see also *In the Matter of New York Telephone Company*, 76 FCC 2d 349, 351 (1980) (“FX enables a customer in one city or exchange area to obtain local business line service in a distant city of exchange area”); *AT&T Corporation v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556, 587 (1998) (“In effect, [the FX service] gives the subscriber a dial tone presence in the distance exchange”).

¹¹ See *In the Matter of MTS and WATS Market Structure*, 77 FCC 2d 224, 228 (1980) (“[FX service] enables persons in the ‘foreign’ exchange area to place calls to the FX subscriber in a distant city by calling a local number”).

Due to technological innovation, FX-like services today are not provisioned in precisely the same manner as the original FX services. In particular, the calling party is no longer required to lease a private line circuit into the desired exchange and then receive a physical dial-tone from the incumbent local exchange carrier serving the call recipient. However, from the perspective of the call recipient, LocalTouch and other modern FX-like services are no different than traditional FX services – the incoming call appears to the call recipient as a local call, and the call recipient can dial the number to place a return call to the original calling party. There has never been any basis to believe that FX or FX-like services are harmful merely because the call recipient may perceive the incoming call as being local even though the call in fact originates from outside the local calling area.

Further, the day is long gone when area codes were tied to specific geographic locations. Consumers today are constantly receiving (and placing) calls where the area code lacks any material geographic meaning. NobelBiz estimates that there are hundreds of millions of cellular and voice over Internet protocol (VoIP) numbers that are not restricted to a specific geographic region.¹² Indeed, most consumers have had the experience of dialing a number with a local area code and having it answered by the call recipient in a distant location. Hence, there

¹² See CTIA—The Wireless Association, “Wireless Quick Facts: Year End Figures,” *available at* <http://www.ctia.org/advocacy/research/index.cfm/aid/10323> (last visited Apr. 1, 2011) (citing 302.9 million in U.S. wireless subscriber connections as of December 2010); FEDERAL COMMUNICATIONS COMMISSION, LOCAL TELEPHONE COMPETITION: STATUS AS OF DECEMBER 31, 2008, Figure 4, at 7 (June 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-299052A1.pdf (last visited Apr. 1, 2011) (citing 21,255,000 in total U.S. interconnected VoIP subscribership as of December 31, 2008).

is no empirical basis for any consumer to assume that the area code of an incoming call shows the physical location from which the call has been originated.¹³

For these reasons, and based on the statutory language and the express statements of Members of Congress in the legislative history, the Commission can and should conclude that FX and FX-like services fall within the category of legitimate uses of calling party identification technology that are not proscribed by the Act. Unfortunately, it is likely that various parties, and the class action lawyers who represent them, may initiate lawsuits testing the meaning and limits of the Act. The result is that the carriers and providers who offer these services, and the customers who utilize them, would be forced to devote substantial resources to defending these actions. While NobelBiz is confident that the judicial process ultimately will reach a consensus that FX-type services do not violate the Act, this conclusion will be only be reached through a case-by-case litigation process that is time-consuming and costly. Moreover, such a process will chill continued innovation in caller ID technology for legitimate and beneficial business purposes. Rather than subject the industry to ongoing uncertainty, NobelBiz recommends that the Commission adopt a belt-and-suspenders approach by exercising its authority under the Act to establish an appropriate exemption for these services.

Therefore, in order to protect the carriers that offer FX and FX-like services, as well as the customers who subscribe to them, NobelBiz respectfully proposes the following exemption:

¹³ Moreover, FX-like services do not mislead the call recipient into believing that the call does not originate from a party that engages in the business of telemarketing, debt collection, or similar businesses. Even if the call recipient mistakenly believes that the local area code denotes a local caller, the call recipient has no basis for assuming that the local caller is not in the business of telemarketing, debt collection, or similar businesses. In any event, there is no “harm” within the meaning of the Act when the call recipient who answers the telephone is able to terminate the call by the simple act of hanging up.

Section 64.1604(d) – By itself, the use of a Caller Identification Service pursuant to which an interexchange call to a call recipient is assigned the same NPA as the call recipient shall be exempt from subparagraph (a) so long as (1) the number provided to the call recipient by the Caller Identification Service can be used by the call recipient to place a return call to the original calling party; (2) in the event the original calling party ceases to be a customer of the Caller Identification Service, and for a period not to exceed three months after the original calling party completes a call to the call recipient, the return-call requirement shall be satisfied if the Caller Identification Service provides to any party dialing the number used by the original calling party a recorded message which identifies the original calling party;¹⁴ and (3) consistent with applicable laws and regulations, the Caller Identification Service does not offer the capability of providing alphabetical information to the call recipient.¹⁵

To be clear, the exemption NobelBiz is proposing would not mean that any telephone call placed over this type of caller ID technology is necessarily lawful. Rather, it means only that the use of this technology cannot be found to constitute a violation of the Act, nor shall it constitute a circumstance that contributes toward the finding of a violation. Should any party knowingly use this technology to place calls with an intent to defraud, cause harm, or wrongfully obtain anything of value, the Act's central provisions would still apply. The value of this exemption is that it would give carriers and their customers the certainty of knowing that the customer's decision to subscribe to an FX-type service will neither violate the Act nor be a relevant factor in adjudicating an alleged violation.

¹⁴ NobelBiz has added this second proviso to achieve the purpose of the return-call requirement in cases where the original calling party can no longer be reached at the number used to contact the consumer because the original calling party has stopped being a customer of the Caller Identification Service.

¹⁵ NobelBiz has added this third proviso to exclude the possibility that this type of Caller Identification Service could mislead or deceive the called party via the provision of alphabetical information. The proposed exemption is designed to cover only the use of this technology to present an interexchange call to a call recipient such that the call is perceived to be a local call. As a result, this proposed exemption would not apply in cases where the calling party is required to provide alphabetical information as well as numerical information.

CONCLUSION

For the foregoing reasons, NobelBiz supports the FCC's proposed rules to implement the Truth in Caller ID Act of 2009, and NobelBiz further urges the Commission to adopt an additional exemption as specified herein.

Respectfully submitted,

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